judicata, is the inquiry whether the same evidence would support both." Having examined and compared the pleadings in both actions, and in view of the issue raised here regarding the monthly payments, I am of the view, and hold, that the evidence required to support this issue is different from that raised in the earlier action. This seems obvious from the defence on the issue here. Accordingly, I am of the opinion that there is no identity of suits here.

Defence counsel has quoted certain passages from Volume 15 (Third Edition) of *Halsbury's* Laws of England regarding the doctrine of *res judicata.* They are, however, concerned with the position where the cause of action in both actions are the same, or are really the same. I have considered the other two local authorities which have been cited by defence counsel, but I consider that they do not detract from the established principle which I have mentioned, that unless the action of the plaintiff in splitting his demands based on two different causes of action is frivolous and vexatious and is an abuse of the process of the court, then he is not debarred from doing so.

In the circumstances of this case, having examined and compared the pleadings in both actions, and having examined and considered the judgment in the earlier action, and for the reasons given, I hold that the objection of the defendant fails. There shall be costs for the plaintiff, to be taxed, in any event, with regard to this objection.

Objection failed.

Solicitors: *Yong & Wong; Ting & Co.*

MASAM v. SALINA SAROPA & ANOR.

[A.C.J. (B.T.H. Lee J.) February 4, 1974]
[Borneo — Civil Appeal No. K. 7 of 1972]

Infants — Guardianship of — Child given into respondents' custody by unmarried mother — Natural mother after marriage claims child — Principles of custody and welfare of child discussed — Guardianship of Infants Ordinance (Sarawak Cap. 93), s. 2.

The appellant, an unmarried mother, gave her child by one G.S. into the custody of the respondents when the child (born 28.8.70) was 9 days old. The appellant in 1972 was legally married and wished to take the child to Australia with her husband an Australian resident. The respondents resisted the claim. Proceedings were thereupon taken by the appellant but her claim was dismissed. She therefore appealed to the High Court. The lower court was satisfied that the mother had never shown and had never had the slightest interest in the infant apart from giving him some presents. The foster parents had lavished their loving care and affection on the infant.

Held, dismissing the appeal: (1) the court below had made findings of fact dependent on its having seen the witnesses and assessed the reliability of their evidence. The appellate court was satisfied that the lower court had exercised its discretion rightly;

(2) the first and paramount consideration was the welfare of the child, to which all other considerations were subordinate. These subordinate considerations include the mother's wishes and the fact that she was the natural mother;

(3) a child's future happiness and sense of security are always important factors and the effect of a change of custody will often be worthy of close and anxious attention, but the fact that change of custody may unsettle the mind of the infant is only a circumstance to be considered and ought not to be regarded as a complete bar to any change.

Cases referred to:-

(1) *Re Satpal Singh, An Infant* [1958] M.L.J. 283.
(2) *Re C. (M.A.) (an infant)* [1966] 1 All E.R. 838.
(3) *Thomas John Barnardo* v. *Margaret McHugh* [1891] A.C. 388.

CIVIL APPEAL.

P. Tan for the appellant.

S. Sahathevan for the respondents.

B.T.H. Lee J.: This is an appeal from the decision of the District Court, Kuching, in an application under the Guardianship of Infants Ordinance (Sarawak Cap. 93) made on the 12th September, 1972.

The infant, Izek Frankie Sidhu, born on 28th July, 1970, was the son of one Guruan Singh and the unmarried mother, Masam ak. Johor @ Magdeline ak. Johor, the appellant.

The appellant was employed in three bars — Hongkong Cafe, Tokyo Bar and Palm Grove, the working hours of which were 11 a.m. to 3 p.m. — 7 p.m. to midnight. The infant had from earliest infancy *i.e.* 9 days old lived with the respondents, Salina Saropa and V. Kalimuthu.

On 16th March, 1972, the appellant was legally married to Eddi Neal, an Australian resident, and they now intend to take the infant with them to settle in Australia.

The appellant demanded that her infant should be handed over to her. The respondents having grown fond of the infant resisted the claim and the result was that the present proceedings were taken.

The learned magistrate delivered a full and detailed judgment giving his reasons refusing to make the order sought by the appellant and dismissed the application.

The magistrate's decision was attacked by the appellant on a number of grounds.

The issue throughout these proceedings has been as to the infant's future custody.

I now turn to the law so far as is relevant for the present purposes.

The Guardianship of Infants Ordinance (Sarawak Cap. 93) enacts in section 2 that in matters regarding custody or upbringing of an infant the welfare of the infant should be regarded by the courts as the first and paramount consideration.

This is a statutory provision, and in my judgment section 2 is quite clear, see *Re Satpal Singh, An Infant.*(1) The headnote reads:

"'Welfare' referred to in section 11 (our section 2) of the Guardianship of Infants Ordinance must be taken in the large signification as meaning that the welfare of the child as a whole must be considered. It is not merely a question whether the child will be happier in one place than in another but his general well-being. The welfare of the child, both moral and physical, should be the paramount consideration in awarding the custody of a child of tender years. The court, in exercising its discretion under the Ordinance, should bear in mind the customs of the parties but should not consider itself bound by them as then it would not be exercising the discretion entrusted to it by the Ordinance."

Every case must plainly be determined upon the particular circumstances affecting that case, though, it is of course, true to say that as a matter of human sense an infant is better with its mother and needs a mother's care. In this case unhappily the mother left the child when he was 9 days old.

The mother's attitude to the child seems to me, as is with the magistrate, to have been very different.

The magistrate was satisfied that the mother has never shown and has never had the slightest interest in this infant apart from giving him some presents.

It is clear that the first and paramount consideration is the welfare of the child, to which all other considerations are subordinate. These subordinate considerations include the mother's wishes and the fact that she is the natural mother. See the Court of Appeal decision in *Re C. (M.A.) (an infant*[2]) and *Thomas John Barnardo* v. *Margaret McHugh*[3] where Lord Herschell in the course of his judgment said at page 399:

"I think this case determine (and I concur in the decision) that the desire of the mother of an illegitimate child as to its custody is primarily to be considered. Of course, if it can be shown that it would be detrimental to the interest of the child that it should be delivered to the custody of the mother or of any person in whose custody she desires it to be, the court, exercising its jurisdiction. as it always does in such a case, with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother."

The fact that change of custody may unsettle the mind of the infant is only a circumstance to be considered and ought not to be regarded as a complete bar to any change.

There can be no doubt on the evidence that the foster parents have lavished loving care and affection on the infant.

If the infant were taken away from the foster parents after such a length of time the result might be that he would develop a permanent emotional scar.

The court below is right when it says it is not possible to forecast with any certainty what the future would hold for him in Australia, and he would be in a completely alien environment.

I have to bear in mind that the court below has seen the witnesses including the infant and has given findings of fact which depend on its having seen the witnesses and assessed by that means to some extent the reliability of the evidence given. I quote the finding of the learned magistrate at page 42 of the judgment:

"Indeed, among other reasons, the applicant have not in the past shown much love for her natural son. She abandoned it to the care of other people.

The child is now attached to the respondents. He is not attached to the applicant.

The applicant may now harbour feelings of remorse and even guilt over the child but I am afraid it is too late now. The court is primarily concerned with the welfare of the child, not with the welfare of the parties to this case."

There can be no doubt whatever that the question was pre-eminently one which depended on the exercise of the magistrate of his discretion and the appellate court would not interfere unless satisfied that the discretion had been wrongly exercised or that some principle had been neglected by the lower court or that there was some other defect. In the present case I am satisfied that the magistrate had exercised his discretion rightly.

A child's future happiness and sense of security are always important factors and the effect of a change of custody will often be worthy of the close and anxious attention which they undoubtedly received in this case.

There is in my view no substance in the other matters raised on the appeal.

For these reasons, as well as for the reasons which appear in the very careful judgment of the lower court, it appears to me that this appeal fails and that the judgment of the learned magistrate must be affirmed and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Yong & Wong; Battenberg & Talma.*

TAN MOOI LIANG v. LIM SOON SENG & ORS.

[F.C. (Azmi L.P., Suffian C.J. and Ong Hock Sim F.J.) April 20, 1974]

[Kuala Lumpur — Federal Court Civil Appeal No. 72 of 1973]

Partnership — Notice by one partner of intention to dissolve the partnership — Whether English law applies — Other provisions made by written law — Contracts (Malay States) Ordinance, 1950, Chapter X, ss. 192-219 — Civil Law Act, 1956, s. 5(1).

In this case the appellant and the four respondents were partners in the business of dealers and distributors in sundry goods. The appellant gave notice of his intention "to dissolve the partnership" and subsequently applied for the order that the partnership be wound up, the taking of accounts and the appointment of a receiver. The respondents pleaded that the notice given by the appellant was ineffective to dissolve the partnership and that it amounted to a notice of intention to retire from the partnership. The appellant applied by motion for the appointment of a receiver and manager. The learned trial judge dismissed the motion and the appellant appealed to the Federal Court.

Held (Suffian C.J. and Ong F.J., Azmi L.P. dissenting) dismissing the appeal: (1) there is no provision in the Contracts (Malay States) Ordinance, 1950, whereby a partner may dissolve a partnership by giving notice of his intention to dissolve it;

(2) because of the many provisions relating to partnership in the Contracts (Malay States) Ordinance, 1950, which constitute "other provisions relating to partnership", section 5(1) of the Civil Law Act, 1956 does not apply and therefore the English law of partnership did not apply in this case.

Cases referred to:-

(1) *Crayshaw* v. *Maule* 1 Swanst. 508; 36 E.R. 483.

(2) *Sathappa Chetty* v. *Subramanyan Chetty* A.I.R. 1927 P.C. 70.

(3) *Terunnanse* v. *Terunnanse* [1968] A.C. 1086.

(4) *Ting Tien Kwang & Ors.* v. *Kong Sung Seng & Ors.* [1964] M.L.J. 427.

FEDERAL COURT.

Chong Foo Seong for the appellant.

Leong Tuck Onn for the respondent.

Azmi L.P.: The plaintiff and the four defendants commenced a partnership in the business of dealers and distributors of sundry goods etc., on or about 1st July